

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

JOSEPH R. AMEDSON, individually and with respect to his licensure as a Pharmacist, No. PH00011607,

Appellant,

v.

WASHINGTON STATE BOARD OF PHARMACY, a Board as established by law under RCW 18.64.001; WASHINGTON STATE DEPARTMENT OF HEALTH, an administrative agency of the State of Washington; ADJUDICATIVE SERVICE UNIT, a unit of the Washington State Department of Health; and ARTHUR E. DeBUSSCHERE, Health Law Judge, Presiding Officer, Adjudicative Service Unit, Department of Health,

Respondents.

No. 39042-6-II

UNPUBLISHED OPINION

Bridgewater, P.J. — Joseph R. Amedson appeals from a Thurston County Superior Court decision that affirmed the Washington State Department of Health (Department) decision to

revoke his pharmacist license. We affirm.

## FACTS

### Background

In 2004, the Department and the Federal Department of Health and Human Services (HHS) were investigating A-Z Pharmacy. At some point after the investigation of A-Z Pharmacy began, Amedson voluntarily contacted the Department to discuss A-Z Pharmacy's prescription and billing practices. During the meeting with Department and HHS investigators, Amedson identified himself as an employee of A-Z Pharmacy and he claimed that certain A-Z Pharmacy employees were engaging in prescription fraud schemes. He provided investigators with a list of drugs he believed were a part of the scheme, including Zyprexa.<sup>1</sup> Amedson did not implicate himself in any prescription fraud schemes.

As a result of their investigation into A-Z Pharmacy, Department and HHS investigators discovered that Amedson was potentially linked to prescription fraud schemes involving Zyprexa. Consequently, Department investigators filed a complaint with the Department's Board of Pharmacy (Board) alleging Amedson's likely involvement in prescription fraud. Later, the Board approved an investigation of Amedson.

Subsequently, Amedson voluntarily agreed to meet with Department and HHS investigators. According to the Department investigator, he informed Amedson before the meeting that the Department had opened an investigation of his alleged prescription fraud

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<sup>1</sup> Zyprexa is a drug used for the treatment of mental illnesses, including schizophrenia and bipolar disorders.

involving Zyprexa. During the meeting, the investigators presented evidence seized from A-Z Pharmacy implicating Amedson in the Zyprexa prescription fraud.<sup>2</sup> Amedson then provided detailed information about his involvement in the fraudulent scheme. According to the Department investigator, he provided Amedson with a packet explaining the investigation, informing Amedson of his rights, and indicating that any written statement he made could be used in disciplinary proceedings.

In addition, Amedson signed a “Respondent’s Written Statement Notice” identifying Amedson as the respondent. AR at 802 (all capitalization omitted). The notice informed Amedson that:

**You may consult with an attorney, at your expense, prior to providing a written statement. Your statement may be used in a hearing if disciplinary action is deemed necessary regarding this matter.**

AR at 802. The acknowledgment in the notice further stated:

I received this notice from WSBP Investigator Stanley Jeppesen before providing my voluntary written statement.

AR at 802.

Five days later, Amedson again met with the Department and HHS investigators. Amedson reviewed a written summary of the oral statements he made, and he requested changes to accurately convey his involvement in the prescription fraud scheme. Over a two hour meeting, the investigators incorporated all of Amedson’s requested edits. When he was satisfied with the statement, Amedson signed the 11-page document. On each of the 11 pages, Amedson initialed

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<sup>2</sup> At least two of the falsified prescriptions were submitted in Amedson’s name as the patient. Amedson did not have a valid prescription for Zyprexa.

the following statement:

I have received no threats, promises or coercion, in preparing this statement. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and I will so testify.

AR at 804-14. Within the statement, Amedson admitted to participating in a Zyprexa fraud scheme during the course of his employment at the A-Z Pharmacy. He admitted that he had received approximately \$3,500 as a result of the scheme.

#### Procedure

On June 5, 2007, the Department issued a statement of charges alleging unprofessional conduct by Amedson under the Uniform Disciplinary Act (UDA), chapter 18.130 RCW. It specifically alleged unprofessional misconduct under RCW 18.130.180(1),<sup>3</sup> (6),<sup>4</sup> (7),<sup>5</sup> and (13),<sup>6</sup>

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<sup>3</sup> RCW 18.130.180(1) defines as unprofessional conduct:

The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not.

<sup>4</sup> RCW 18.130.180(6) defines as unprofessional conduct:

The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself.

<sup>5</sup> RCW 18.130.180(7) defines as unprofessional conduct:

Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice.

<sup>6</sup> RCW 18.130.180(13) defines as unprofessional conduct:

Misrepresentation or fraud in any aspect of the conduct of the business or profession.

RCW 18.64.160(3),<sup>7</sup> and RCW 69.41.020(5).<sup>8</sup> Amedson denied the charges, asserted affirmative defenses, and requested a hearing.

During discovery, Amedson refused to appear at a deposition to which he was subpoenaed. He claimed that federal prosecutors had granted him immunity arising out of the criminal prosecution of A-Z Pharmacy. In addition, he asserted a privilege against self-incrimination under the Fifth Amendment to the United States Constitution. Amedson failed to produce any evidence supporting his alleged immunity agreement. The presiding officer denied Amedson's motion to quash the deposition notices. Amedson filed a motion to reconsider, claiming in a declaration that he also had an oral immunity agreement with the Department investigator. Soon thereafter, Amedson moved to suppress all oral and written statements he had provided the investigators. The presiding officer denied the motion because Amedson failed to establish the existence of any oral immunity agreement by clear and unequivocal evidence.

The Department subsequently moved for sanctions based on Amedson's refusal to appear for the deposition. The presiding officer ordered Amedson to appear to state his claimed privilege as the basis for not answering each posed question. Amedson again refused to appear. He then moved to dismiss the disciplinary case based on his alleged immunity. The presiding officer denied the motion because Amedson failed to establish that he had an immunity agreement or that he qualified for immunity as a whistleblower.

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<sup>7</sup> RCW 18.64.160(3) provides grounds for disciplinary action against a pharmacist's license, including knowingly violating "any provision of any state or federal law, rule, or regulation governing the possession, use, distribution, or dispensing of drugs."

<sup>8</sup> RCW 69.41.020(5) prohibits a person from making or uttering "any false or forged prescription or other written order for legend drugs."

During a final prehearing conference, the presiding officer ruled on and summarized all the pretrial rulings. In addition, he defined conduct for the hearing. For example, the presiding officer limited the issues for the Board's consideration to whether Amedson's conduct violated RCW 18.130.180(1), (6), (7), and 13; RCW 18.64.160(3); and RCW 69.41.020(5), consistent with the original charges. And he prohibited Amedson from arguing that he was entitled to immunity as a whistleblower or as a result of any alleged immunity agreement that he had.

Moreover, the presiding officer ruled that Amedson willfully interfered with the Board's proceedings when he refused to attend the Department's depositions. He concluded that sanctions were appropriate for Amedson's willful interference with the proceedings under WAC 246-11-170.<sup>9</sup> As a sanction, the presiding officer ordered that Amedson could not testify about information that the Department was unable to discover due to his failure to appear at depositions.

Amedson filed a motion for reconsideration of the Board's final pretrial order. Within that motion, he informed the Board that unless it reversed its final pretrial order, he would protest by not attending the hearing.

On March 7, 2008, the Board commenced a hearing on the allegations that Amedson acted unprofessionally under the UDA. Neither Amedson nor his counsel appeared, placed objections on the record, made opening or closing arguments, or cross-examined witnesses. The presiding officer found Amedson in default and conducted the hearing in his absence. The Board

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<sup>9</sup> WAC 246-11-170 states that grounds for sanctions include "(a) Failure to comply with these rules or orders of the presiding officer; and (b) Willful interference with the progress of proceedings."

heard testimony from Department investigators and it admitted four Department exhibits. In addition, the Board admitted two exhibits Amedson had marked for admission during the pretrial process.

On April 26, 2008, the Board issued its final decision and order revoking Amedson's license to practice pharmacy in Washington, with no right to reapply for reinstatement for 20 years. The Board's final decision included its order of default against Amedson, in addition to notification that should Amedson seek to vacate the default order, he was required to do so within seven days after service of the order. Rather than filing a motion to vacate the default order, Amedson petitioned for judicial review in Thurston County Superior Court on May 14, 2008, seeking direct review by the Court of Appeals. The superior court denied Amedson's motion to transfer review to the Court of Appeals. It later affirmed the Board's decision. Amedson appeals.

## ANALYSIS

### Standard of Review

The UDA governs the discipline of pharmacists. RCW 18.64.163. Medical disciplinary proceedings serve two purposes: (1) to protect the public and (2) to protect the standing of the medical profession in the eyes of the public. *In re Kindschi*, 52 Wn.2d 8, 11, 319 P.2d 824 (1958). The UDA confers on the Board authority to discipline pharmacists. *See* RCW 18.130.050; RCW 18.64.005.

We review the Board's orders under the Washington Administrative Act (APA), chapter 34.05 RCW. *Ames v. Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260,

208 P.3d 549 (2009), *cert. denied*, 130 S. Ct. 1528 (2010); *DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 180, 151 P.3d 1095 (2007). In reviewing an administrative action, we sit in the same position as the superior court, applying the APA to the Board record. *DaVita*, 137 Wn. App. at 180. As the party challenging the Board action, Amedson bears the burden of establishing it was invalid. *DaVita*, 137 Wn. App. at 180 (citing RCW 34.05.570(1)(a)).

We review the Board's factual findings to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise. *DaVita*, 137 Wn. App. at 181. We review the Board's legal conclusions de novo; although, we grant substantial weight to the Board's interpretation of its own statutes and rules. *Davita*, 137 Wn. App. at 181. In a medical disciplinary proceeding, the Department must prove license revocation by "clear and convincing evidence." *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002).

#### The Board's Decision

As an agency, the Board had authority to enter a default judgment against Amedson for failing to attend or participate in the hearing. RCW 34.05.440(2);<sup>10</sup> WAC 246-11-280(3);<sup>11</sup>

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<sup>10</sup> RCW 34.05.440(2) provides:

If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

<sup>11</sup> WAC 246-11-280(3) provides:

If a party requests an adjudicative proceeding but fails to appear at the hearing, the presiding officer may issue an order of default in the same manner as subsection (2) of this section, or may proceed to hear the matter in the absence of the party and issue a final order.

*Graves v. Dep't of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). Once a default judgment was entered, Amedson was required to file a motion to vacate the default order within seven days after service of the default order. RCW 34.05.440(3). Filing means actual receipt of the motion to vacate by the Adjudicative Service Unit in Olympia, Washington. RCW 34.05.010(6).

Here, Amedson not only failed to appear at the hearing but he also failed to file a motion to vacate the default judgment within seven days. There is no evidence that Amedson filed any a motion to vacate the default judgment. Therefore, he has waived his right to argue that the Department's default judgment was invalid. The APA requires a petitioner to exhaust all administrative remedies before judicial review is appropriate. RCW 34.05.534.<sup>12</sup> Accordingly, we will not disturb the Board's default judgment against Amedson.

In any event, despite filing the default judgment against Amedson, the Board heard the matter in his absence. Under the Department regulations, the Board had no obligation to decide the matter on the merits once it entered the default judgment. WAC 246-11-280(3) (presiding officer may enter default judgment *or* proceed to hear the matter in the party's absence).<sup>13</sup>

We could end our analysis here, but because Amedson does not even acknowledge his failure to challenge the dispositive default judgment, we briefly address the merits of the Board's

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<sup>12</sup> Amedson makes no attempt to argue that he should be relieved from the requirement to exhaust administrative remedies because those remedies would be patently inadequate or futile, or that grave irreparable harm would result from having to exhaust the administrative remedies available to him. *See* RCW 34.05.534(3).

<sup>13</sup> Amedson does not challenge WAC 246-11-280 on appeal.

decision, and we arrive at the same conclusion. Notwithstanding the default judgment, Amedson has failed to meet his burden of proving the Board's revocation of his pharmacy license was invalid. *See DaVita*, 137 Wn. App. at 180 (citing RCW 34.05.570(1)(a)). Based on the record before us, the Board's factual findings are supported by substantial evidence and those factual findings support its legal conclusions. *DaVita*, 137 Wn. App. at 181.

The Department's evidence overwhelmingly established that Amedson voluntarily contacted the Department to discuss fraudulent activities ongoing at his place of employment. It established that Amedson neglected to inform the investigators during this first meeting of his complicity in the fraudulent schemes. The evidence further established that the Department eventually opened an investigation into Amedson, informed Amedson of its investigation, and provided Amedson with notice that he had a right to consult an attorney before providing any written statement and that the Department could use any written statement Amedson made against him in a disciplinary action. Nevertheless, Amedson worked with Department investigators, without counsel, over the course of several days and hours to craft an accurate statement. The evidence shows that Amedson signed that statement, in which he admitted to participating in a reimbursement scheme to defraud a drug manufacturer for reimbursement of Zyprexa, a pharmaceutical. Amedson admitted to receiving about \$3,500 for his participation in the fraudulent Zyprexa scheme. Finally, there is no evidence that the Department granted Amedson immunity in exchange for his statement or that Amedson qualifies for statutory immunity. Reviewing the record before us on appeal, the Department established by clear and convincing evidence that Amedson violated RCW 18.130.180(1), (6), (7), and (13), RCW

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18.64.160(3), and RCW 69.41.020(5). The Board's decision to revoke Amedson's pharmacy license for no less than 20 years<sup>14</sup> is supported by the record. *See Nguyen*, 144 Wn.2d at 518.

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<sup>14</sup> Amedson does not challenge the length or severity of the revocation on appeal.

Constitutional Issues

Amedson raises several constitutional issues. The crux of his appeal is based on the premise that he was entitled to the constitutional privilege against compulsory self-incrimination equivalent to that of a criminal defendant under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. He further contends that the Board denied him an opportunity to present a defense under the Sixth Amendment to the United States Constitution. We decline to reach the merits of Amedson's remaining issues. By refusing to participate in the hearing, Amedson failed to exhaust his administrative remedies. *See* RCW 34.05.534. *See, e.g., Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 936, 808 P.2d 1155 (1991) (plaintiffs were not entitled to review by appellate court because they failed to exhaust their remedies when they refused to attend the equivalent of an administrative hearing). At a minimum, Amedson could have appeared at the hearing through counsel to state his objections on the record. Instead, he issued an ultimatum to Board, stating in no uncertain terms that unless the Board reversed its pretrial orders he would protest by not attending the disciplinary hearing that he initially requested.

Moreover, Amedson has made no attempt to argue that the administrative remedies would have been patently inadequate, exhaustion would have been futile, or he would have suffered grave irreparable harm that would clearly outweigh the public policy requiring exhaustion of the administrative remedies available to him. *See* RCW 34.05.534(3). Accordingly, we will not entertain the merits of Amedson's constitutional issues.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

I concur:

Hunt, J.

Quinn-Brintnall, J. (concurring separately) — I concur with the majority opinion decision to affirm the decision of the Washington State Department of Health to revoke Joseph Raise Amedson’s pharmacist license. I write separately to emphasize that Amedson knowingly and intentionally refused to participate in the Board’s licensing review process. The Board had authority to enter a default judgment against Amedson for failing to attend or participate in the hearing and it did so. RCW 34.05.440; WAC 246-11-280(3); *Graves v. Dep’t of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). Because the default judgment was proper, the merits of any claims Amedson could have, but did not, preserve now lie beyond the legitimate scope of our review. Accordingly, the portion of the majority opinion referencing the merits of Amedson’s claims is dicta and I concur solely in that portion of the majority opinion establishing the legitimacy of the default judgment.

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QUINN-BRINTNALL, J.